

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHNNY RAY WOLFENBARGER,
Defendant.

Case No. 16-CR-00519-LHK-1

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO STRIKE TESTIMONY OF
AGENT MARCEAU**

Re: Dkt. No. 403

On August 11, 2021, Defendant filed a Motion to Strike Testimony of Agent Marceau Relying on Hearsay to Establish the Truth of the Matter Asserted; and In the Alternative, Proposed Curative Instruction. ECF No. 403. Defendant asked the Court to strike Agent Marceau’s testimony to the extent Agent Marceau “relied on [] third party statements [in certain chats in Government Exhibit No. 3] to offer his opinion regarding what was actually occurring during the chat.” *Id.* at 4.

In response, the Court proposed an instruction “Striking Limited Testimony re: Government Exhibit No. 3” that would grant Defendant’s request in part. ECF No. 405. The government filed a statement of no objection to this proposed instruction. ECF No. 408. However, Defendant suggests adding the following underlined language to the Court’s proposed instruction:

The Court has instructed you that any statements made by anyone other than

“jrwolfen02” in the chats in Government Exhibit Nos. 3, 5, 7, 8 and 12 are not offered to prove the truth of the matter asserted in those statements.

For this reason, I further instruct you that you may not consider testimony by Agent Marceau in which he relied on statements by anyone other than “jrwolfen02” to make factual assertions or offer factual opinions.

As one example, as to the chat in Government Exhibit No. 3, I further instruct you that the Court strikes, and the jury may not consider, Agent Marceau’s testimony that a speaker in the chat was a school-aged child based on that speaker’s discussion of going to a Christmas party at a school or that the speakers in the chat changed.

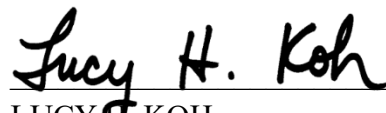
ECF No. 410 (Defendant’s emphasis in original).

Defendant’s proposed additional language is overbroad and unwarranted. Moreover, the Court has not admitted the third-party statements at issue for the truth of the matters asserted therein. *See, e.g.*, Amended Order Granting in Part Government’s Motion to Admit Chat Transcripts on Exhibit List, ECF No. 383 at 8–9 (analyzing uses of third-party chats). The Court notes that even if the third-party statements had been admitted for their truth, many are not hearsay. For example, Defendant manifested that he adopted or believed to be true many third-party statements in all of the chats. Federal Rule of Evidence 801(d)(2)(B) provides that a statement is “not hearsay” if it is “offered against an opposing party and[] is one the party manifested that it adopted or believed to be true.”

Accordingly, the Court GRANTS IN PART and DENIES IN PART Defendant’s instant motion, ECF No. 403. The Court will read the following instruction tomorrow morning. The Court will neither include this instruction in the final jury instructions and nor give a copy of the instruction to the jury in writing.

IT IS SO ORDERED.

Dated: August 11, 2021


LUCY H. KOH
United States District Judge

INSTRUCTION No. 21

STRIKING LIMITED TESTIMONY RE: GOVERNMENT EXHIBIT No. 3

The Court has instructed you that any statements made by anyone other than “jrwoffen02” in the chats in Government Exhibit Nos. 3, 5, 7, 8 and 12 are not offered to prove the truth of the matter asserted in those statements.

As to the chat in Government Exhibit No. 3, I further instruct you that the Court strikes, and the jury may not consider, Agent Marceau’s testimony that a speaker in the chat was a school-aged child based on that speaker’s discussion of going to a Christmas party at a school or that the speakers in the chat changed.

United States District Court
Northern District of California